

# **Humanitarian Intervention in Kosovo: The Importance of Legal and Moral Issues**

**A Monograph**  
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## **Abstract**

### **HUMANITARIAN INTERVENTION IN KOSOVO: THE IMPORTANCE OF LEGAL AND MORAL ISSUES**

by MAJ Helene A. Carras, U.S. Army, 56 pages.

During 1999, NATO instituted a bombing campaign and other military operations against the former Yugoslavia (Kosovo) in order to restore peace and prevent their humanitarian crisis from causing further conflicts within the Balkans. The justification for these operations was to secure international peace and security in the region and to ensure the Federal Republic of Yugoslavia complied with peace demands made by the Security Council. The debate in the international community arose whether the bombing was justified in order to quell the humanitarian crisis. As a humanitarian intervention, it entails complicated legal and moral issues that support this justification.

Understanding the legal and moral issues in conflict is important and should be considered by military planners and policy makers. The Kosovo conflict, as a “humanitarian intervention” provides a case study for such an analysis. The legal issues in this monograph are focused on the International Court of Justice case of May 1999, Yugoslavia vs. the United States. The court case brought out that the law is unclear whether humanitarian purposes override use of force under Articles 2(4), 51, and 53. There are also some provisions under customary and traditional law that leave this question open to future interpretation depending on the prevailing political situation.

A review of the literature shows that moral arguments for the intervention had and can have a large effect on support or lack thereof, in the US and in the international community. This can contribute to the swift initiation or the termination of a humanitarian intervention.

These considerations are applicable to 2007 and beyond, when military planners and policy makers will need to apply a legal and moral lens to viewing and understanding conflict.

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## INTRODUCTION

Fromkin frequently pointed out George Kennan's view that "morality and legality, rather than power" was the predominant, but incorrect view of international relations.<sup>1</sup> Kennan had observed a strange tendency by Americans to think in terms of legal and moral issues in foreign policy. He believed from his experience, that Americans seemed to have a "persistent urge to seek universal formulae or doctrines in which to clothe and justify particular actions."<sup>2</sup> He argued that Americans tend to formulate "norms" in distinguishing whether to intervene; these "norms" categorize and impersonalize facts that detract from the particulars and make Americans comfortable with their decisions. An example of this is the treatment of whole categories of nations as "communist" or "non-communist" or taking an action to "make the world safe for democracy," not as he suggested for the facts of the particular case and the judgment of the President or Secretary of State.

He believed the reason for this was that the US is a nation traditionally ruled by laws and legal bodies more than by individual leader's decisions. As such, he explained, a norm is a type of law and hence, the American need to fit circumstances and facts into them. He actually argued against this mentality in the formation of the NATO alliance; he felt that too often, legalities prevented the proper consideration of actions, and too often restricted them and hindered reasoned, true diplomacy.<sup>3</sup> Perhaps it is the inherent power in the legal and moral appeals that stem from this tendency. *A view of conflict through the legal and moral lenses is important for understanding conflict; Kosovo provides such a case study in the use of moral and legal arguments in order to justify American intervention.*

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<sup>1</sup> David Fromkin, *Kosovo Crossing* (NY: Simon & Schuster, 1999), 25. Fromkin, a noted professor of History and International Relations at Boston University, is also the author of *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Middle East*.

<sup>2</sup> George F. Kennan, *Memoirs, 1925-1950* (Boston: Atlantic Monthly Press, 1967), 322.

<sup>3</sup> Ibid., 323, 409.

## **BACKGROUND AND HISTORY**

During 1999, NATO instituted a bombing campaign and other military operations against the former Yugoslavia (Kosovo) in order to restore peace and prevent their humanitarian crisis from causing further conflicts within the Balkans. The justifications for these operations were to secure international peace and security in the region and to ensure the Federal Republic of Yugoslavia complied with peace demands made by the Security Council. The debate in the international community arose whether the bombing of Kosovo was justified in order to quell the humanitarian crisis. Part of the international debate focused on whether NATO had proper justification for the use of force for humanitarian purposes.

Since the bombing campaign, and after the Somalia intervention several years before it, writings on the controversial doctrine of humanitarian intervention have grown exponentially. Even though it is not a new doctrine; its roots can be traced back as far as the middle 1500's. However, in the last seven years, the literature has exploded in volume and attempted to clarify and explain these facets while social and political scientists, legal scholars, and world leaders have attempted to make sense of it in some kind of workable construct. However, the literature is still developing and is unclear. In addition, there are conflicting cultural values concerning how to preserve world peace and prevent genocide and war escalation. To complicate matters, it has theoretical underpinnings where the legal, political, and ethical worlds intersect. The deeper these issues are studied, the more it will be discovered how volatile and unsettled the doctrine is; however one thing is clear—it converges in two key issues, law and morality.

Although the literature on legal and moral aspects of the Kosovo intervention and other humanitarian interventions has been explored by many writers, this paper will seek to offer a legal perspective that is focused on the International Court of Justice case, *Yugoslavia vs. the United States* and merges the current human rights literature generated since that conflict started.

The basic document for analyzing the humanitarian and legal issues is the UN Charter and the three basic articles concerning the use of force, strictly and traditionally construed, must adhere to these provisions. Section 2 (4) of the UN Charter, states that the use or threat of use of force is prohibited by any member state against any other state unless authorized under two exceptions: the right to self-defense, Article 51, Chapter VII; and with the authorization of the Security Council, Article 53, Chapter VII. These, among others, are the basic provisions used in the international law case, *Yugoslavia vs. The United States*.

In order to obtain a legal opinion, in May 1999, the Federal Republic of Yugoslavia had requested the International Court of Justice in The Hague to indicate provisional measures against the United States and seven other NATO member countries that participated in the bombing campaign of April 1999. Although the court ultimately ruled that there was no jurisdiction to decide the matter, the court heard arguments as to the legality of the use of force by these countries against Yugoslavia that were relevant to deciding any future claims of this nature.

In the case, Yugoslavia claimed that the bombing violated the obligation to refrain from: the use of force against another state, intervention into the affairs of another state, hostility against historical monuments, use of prohibited weapons, causing considerable health and environmental damage, destruction of bridges and navigation channels, and the inflicting of physical destruction against a national group. Overall, the claim was that the use of force was unjustified, illegal and the named nations were responsible. It was asserted that this use of force was illegal in theory under traditional UN Charter provisions: Section 2 (4) and Articles 51 and 53. However, the court case brought out that the law is still unclear whether humanitarian purposes override this rule. Also, there are some provisions under customary and traditional international law that leave this question open to future interpretation depending on the prevailing political situation.

In order to understand the issues in the dispute, historical background information is provided on the relevant state organizations, actors, and entities:

## **Kosovo**

After World War II, Kosovo was part of Serbia, had a predominantly Albanian ethnic population, and was relatively autonomous. As Kosovo attempted to push for more autonomy, Serbia retaliated with heavy migration into these areas. Responses and rebuffs fueled by centuries of conflicting values, religious fervor and various flavors of nationalism escalated into Serbia instituting severe repression after Albania demanded complete autonomy. After protracted settlement negotiations failed to reach any settlement, NATO commenced aerial bombing attacks in March 1999. In response to these attacks, Serbia forced approximately 1.5 million Kosovars out of their province, and killed from 7,000 to 10,000 Kosovars. In June, 1999, after a final agreement was reached, NATO ceased the bombing campaign and peacekeepers moved into Kosovo.<sup>4</sup>

Since the bombing campaign of Kosovo, the world has paid greater attention to the history and social conditions in the Balkans and the strategic importance of this area. Kosovo itself has a long and contested history that needs to be considered in order to better understand the contentious issues between the Serbs, Albanians, the region and the international community. In looking at the reasons why Kosovo is important and contested, Vidakovic-Petrov explained the historical, demographic, social, and geopolitical causes that led up to the NATO bombing and conflict. As she stated, however, many areas in the world have endured such internal conflicts, so why should Kosovo have been bombed? She argued,

there is no doubt that Kosovo has been an internal political problem for a long period of time. However, as far as its nature and scope was concerned, it was much less of an international problem than the problem of the Kurdish minority in Turkey, the long-lasting Israeli-Palestinian conflict, the issue of Chechnya in Russia or the question of East Timor in Indonesia...So why was Kosovo so much more important than Turkey, the Middle East or Asia?<sup>5</sup>

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<sup>4</sup> Encyclopedia.com., Kosovo, <[www.encyclopedia.com/printable.asp?url=ssi?K?Kosovo.html](http://www.encyclopedia.com/printable.asp?url=ssi?K?Kosovo.html)> (accessed 30 July 2002).

<sup>5</sup> Krinka Vidakovic-Petrov, "Breaking the Balkans: Yugoslavia '99," in *Kosovo-Serbia: A Just War?* ed. Frank Columbus (Commack, NY: Nova Science Publishers, Inc., 1999), 13. According to the

It has become cliché to assert that this conflict, among many of the Balkan conflicts is centuries old, dismissing the complexities and origins of the problem. Many explanations have been offered to the “problem,” as Vidakovic-Petrov explained, the “root of the problem” can be traced to the time of the Ottoman rule, when the Serbs and Albanians struggled for control over Kosovo-Metohia.<sup>6</sup> During these years, the Albanians, the majority of whom were Muslims, were encouraged by the Empire to procreate, settle Kosovo, and convert the Serbs and other Christians of that area to Islam. At that time, prejudicial laws and treatment against Serbs were instituted in order to reinforce the Islamification of Kosovo.

Over time, the struggles of the surrounding Christian nations successfully strengthened their influence in the area, causing the Ottomans to lose power. However, as Petrov pointed out, soon “other powers moved in; one of them was Austria-Hungary, which at that time had a strong interest in establishing control over the Adriatic coastline (where the geostrategic position of Albania played an important role.)”<sup>7</sup> Petrov explained, eventually, Austria-Hungary received control over Bosnia-Hercegovina through the 1878 Congress of Berlin and asserted its influence in various ways by alliances with the Kosovar Albanians through the “League of Prizren.” However, the struggle continued; he stated Serbia did retake control over Kosovo after the 1912 Balkan War. But this was only a continuation of a previous struggle; this contentious area was fought over during the time of World War I and II, with the Serbs against the Austria-Hungarians and then against the Axis powers. According to this account, it was after Germany “occupied and dismembered Yugoslavia” which set the stage for the Albanian’s goal of a “Greater Albania;” he explained,

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editor, Vidakovic-Petrov was an outspoken critic of the Kosovo bombing and for this reason was selected as a contributing essayist for this compilation.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

after the Axis powers occupied and dismembered Yugoslavia. . . two puppet states were established: the Independent State of Croatia (sponsored by Germany) and Greater Albania (sponsored by Italy), to which Kosovo-Metohia was annexed. Serbs and Jews were massacred, terrorized and sent to concentration camps by wartime authorities run by local Albanians.<sup>8</sup>

This “ethnic cleansing” by the Kosovo Albanians continued through the end of World War II and afterwards despite the establishment of a new Yugoslavian government. It was also in the post-war period that the Kosovo Liberation Army, (KLA), began to form, which continued to push for Kosovo as part of Greater Albania. Accordingly, these struggles had continued even up to the start of the Kosovo bombing. For example, in 1946, Kosovo became an “autonomous region,” then in 1963, it was “upgraded, becoming an autonomous province” which status was further reinforced by the 1974 Constitution of Yugoslavia.<sup>9</sup> However, it never received the right to self-determination, which was the goal of the Kosovar Albanians as well. The government of Yugoslavia would not consent, which led to uprisings. According to the Petrov account, the Yugoslav government refused to do this in order to preserve the rights of the Serbs, and weaken the Albanian backed ethnic cleansing of the Serbs.<sup>10</sup>

O’Neill provided an instructive summary of the events that led up to the Kosovo intervention that shed light on the complex political issues that eventually played out. He began with the actions of Slobodan Milosevic, who had prevented Kosovo from receiving autonomy in 1989. This, in turn, incited the Albanian population to institute a resistance movement, albeit “passive,” that placed them and the Serbs in direct confrontation.<sup>11</sup>

Milosevic’s intention was to turn Kosovo into a predominantly Serb entity by stemming the heavy population growth of the Albanian people into Kosovo and instituting prejudicial legal and economic reforms. The Kosovo Albanians’ de-facto leader, Ibrahim Rugova, had organized

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<sup>8</sup> Ibid., 8-9.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 9-10.

and headed a resistance movement and the beginnings of a political party, the LDK, to the Milosevic regime which he hoped would lead to Kosovo's independence. Rugova's "passive resistance movement" existed from between 1989 and 1995, which assisted ethnic-Albanian Kosovars in their political and humanitarian goals against the Serbs' domination--domination that existed through Milosevic's tacit approval.

According to O'Neill, it was after the Dayton Peace Accords in 1995, that the conflict began to take a severely violent turn, partly because the agreement was signed by Milosevic, representing only the Serb interests. The Albanian Kosovars had felt that the negotiations were biased in favor of the needs of the Bosnians Serbs but not for themselves; they had anticipated some actions on their behalf, but none of this happened. This action, despite prior notice that the focus was to be the settlement of the Bosnian war only, as O'Neill points out, amounted to "complete avoidance of the Kosovo issue during the Dayton talks" which "devastated the Albanians; the favored treatment of the Bosnian Serbs, their "territorial recognition" incited the Kosovar Albanians—some into believing that "maybe violence did pay."<sup>12</sup> He explains, their rationale was that the Bosnian Muslims had received a "Bosnian-Muslim Croatian Federation (which includes the Muslim and Croatian areas) within the Bosnian state" when the Republika Srpska was established. The end result of this, he argued had "a huge impact on the 'moral complexity' of Kosovo following the NATO air campaign."<sup>13</sup> In the time prior to the campaign, the resistance movement that was incited, did turn violent, (exacerbated by Kosovar poverty and losses from banking scandals in Albania) supplied by stolen weapons from state armories and

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<sup>11</sup> William G. O'Neill, *Kosovo: An Unfinished Peace* (Boulder, CO: Lynne Rienner Publishers, Inc., 2002), 21. O'Neill is a well-known author in the human rights and international legal field and has served in Haiti and Rwanda in UN Human Rights Missions., (Forward, p. 7).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., 22.

other suppliers. Thus, he explained, the Kosovar Albanians organized the resistance around certain armed militant groups and conducted active operations against the Serbs.<sup>14</sup>

He argued, it was during this “pre-war period” and in these conditions, from 1989 to 1999, that the UCK/KLA, (the Kosovo Liberation Army) came to power and began an organized insurgency against the Serbs in power. It had already established a presence in certain areas of Kosovo, such as the Drenica Valley for several years prior to the pre-war period; however, it became active and sought out Serb police and government facilities for mass attacks. In retribution, the Serbs attacked UCK facilities in February 1999, as well as certain members and their families in their living areas.<sup>15</sup>

O’Neill stated that this was the real beginning of the Kosovo conflict for independence, but “now the men with the guns would decide Kosovo’s future. The Milosevic regime had failed to solve the ‘classic conundrum’ of how to suppress the insurgents without acting as their recruiting sergeants.”<sup>16</sup> And, he observed, this was the time that the world started to take note and fear that Kosovo was deteriorating into a war based on continuing cycle of escalating UCK attacks and Serb retaliations. Massive Serb attacks into the Drenica Valley, often with civilian casualties, in Summer 1998, forced several thousand Albanians into the nearby mountain areas without food or water or means to subsist. With the Albanians refusing to talk with Milosevic, the US negotiator, Richard Holbrooke, obtained an agreement for Serb withdrawal and a verification force of 2,000 civilian inspectors. He stated, this was done under a threat of NATO airstrikes, if Milosevic did not comply with UN Security Council Resolution 1199, “which called for an immediate cease-fire, and the ‘withdrawal of security units used for civilian repression.’”<sup>17</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid., 22-23.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 24.

## **United Nations**

“It would be too cynical to assume that all idealism necessarily perishes on the altar of *realpolitik*. The League was shaped-at least-in part by an idealistic dream of a better world, as is the United Nations.”<sup>18</sup> --Geoffrey L. Simons

This quotation from Geoffrey Simons, is comforting to one who studies the disturbing issues within the Kosovo conflict. But has the UN lived up to this principle? Has this materialized concerning Kosovo, in both the legal, moral and political issues at stake? In order to answer this, some background on the United Nations is provided. And in the larger sense, can this provide a better understanding on future humanitarian interventions?

This question originates with the need and origins of international law. But more aptly, Simons describes the inherent need for alliances and order among states can be traced back to written history; he stated, “there have always been thoughts of an international order, established by military conquest, economic imperialism or spiritual and ethical commitment.”<sup>19</sup> He cited Erasmus in the 15<sup>th</sup> Century, as calling for “kingdoms of moderate power united in a Christian league.”<sup>20</sup> In the late 1600’s, Grotius published his “On the Law of War and Peace,” which provided a basis of international law and to provide a framework for controlling what would be or should be considered a “just war.” So, according to Simons, the United Nations has its basic origins in the beginnings of international law and the need for order among nations. This inquiry, was carried through to recent history, with the writings of Immanuel Kant, who called for a “League of Nations, an organization where every State, even the smallest, can expect security and peace.”<sup>21</sup> And as Simons showed, this idea of a “League of Nations” continued to flourish among influential peace activists and noted philosophers for two hundred years before ever materializing; he argues: it was the need for nations to do so, that it was in their economic

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<sup>18</sup> Geoffrey L. Simons, *The United Nations: A Chronology of Conflict* (New York: St. Martin’s Press: 1994), 3.

<sup>19</sup> Ibid., 3.

<sup>20</sup> Ibid., 4.

<sup>21</sup> Ibid., 5.

interests to have order and conflict resolution. This, he explained, was generated by the growth of industry and interdependence; an emerging globalization of business was foreseen even then. Further, the need for peace was emphasized at that time by President Woodrow Wilson, “one of the principle architects of the League of Nations,” who called for the creation of an association of nations which would respect peace and security for all.<sup>22</sup> The Fourteen Points of this were in furtherance of this overarching goal, such as “freedom of navigation on the seas, free trade, reduction in armaments, and other such purposes and principles.”<sup>23</sup>

Although the Treaty of Versailles, which created the League, was not ratified by the U.S. Congress, the league did have some successes in the area of humanitarian assistance. For example, it assisted in the treatment of refugees, human rights for prisoners of war, protections for health, improvements in education, and placing pressure on nations practicing illegal activities, such as slavery. Although the League was officially dissolved in 1946, it in many ways, he asserts, this ultimately set the stage and tone in principle for the United Nations.<sup>24</sup>

It had become evident, that a world body for resolving differences and keeping the peace was needed and utilized especially after World War II, just as it was needed after World War I.<sup>25</sup>

The United Nations originated with the alliance of countries that fought against the Axis powers in World War II.<sup>26</sup> Twenty-six countries cooperated on a collective peace process following the war. Four countries: China, Great Britain, the USSR, and the United States met in October 30, 1943, pledging to replace the League of Nations, and forming the Moscow Declaration. In August 1944 until October 1944, talks convened at Dumbarton Oaks, in which the countries agreed on preliminary provisions of the UN Charter. Then, at the Yalta Conference, in February 1945, these agreements were further refined. Other countries that fought against the

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<sup>22</sup> Simons, *The United Nations*, 6.

<sup>23</sup> Ibid., 8.

<sup>24</sup> Ibid., 33.

<sup>25</sup> Ibid., 35.

Axis were a part of the process during the founding conference in San Francisco during 1945, and the UN Charter was signed on June 26, 1945. It was ratified in October 1945, and the first General Assembly met in January 1946.<sup>27</sup>

The overall mission of the organization was to prevent aggression, and to pursue humanitarian efforts. However, the UN has not functioned as it was originally proposed, because the original five members have not reached unanimity in many key issues regarding use of forces. For example, the Security Council was intended to have a separate military staff and forces of its own. But since the Cold War, the USSR, the United States, and other members have reacted in opposition and along bipolar lines, which caused the UN member nations to have to go around the rules set out in the Charter, or otherwise reach continual stalemate. Also, the setting up of regional alliances, such as North Atlantic Treaty Organization, Organization of American States, and the Warsaw Treaty Organization have been shown to work around, instead of within constraints written into the UN Charter, also because of Security Council stalemate. This led to an expansion, in practice, of the original and intended power and role of the General Assembly by the U.S., Britain, and France and other nations acting in support from Latin American countries as well as British Commonwealth countries. This further watered down the influence of the west against the east in voting. The assembly began to really wield its influence when it adopted a resolution, “Uniting for Peace,” whereby it could intervene by force (with newly created UN forces) when the usual stalemate of the Security Council occurred. These forces had been created by the Security Council in the absence of the vote of the USSR, which had boycotted the Security Council because China was not allowed to join. These forces were used in the Korean Conflict.

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<sup>26</sup> Encyclopedia.com, “United Nations” on-line, <[http://www.Encyclopedia.com/printable/asp?url=/ssi/section/un\\_history.html](http://www.Encyclopedia.com/printable/asp?url=/ssi/section/un_history.html)> (accessed July 20, 2002).

<sup>27</sup> Ibid.

However, the assembly has been forestalled several times from sending UN forces to intervene by the Soviet Union, prevention of intervening in Hungary in 1956, is an example.<sup>28</sup>

As the power of the Assembly grew, so did the influence of the Secretary-General, especially when the vision, agenda, and popularity of this person enabled him to assume an executorial stance and broadly interpret his functions--all amounting to a further evolution of his role and that of the UN.

As the roles of its various sections have expanded, so have the frequency of use of its forces, in humanitarian aid and relief efforts, and for peacekeeping, especially in the less developed countries, such as Somalia, Haiti, and Sierra Leone. Since 1948, there have been more than 53 UN peace-keeping operations.<sup>29</sup>

This trend is expected to increase in the future. In a February 2007, press release, the UN Secretary General, Ban Ki-Moon, commented that the amount of peace-keeping operations requested of the UN has grown exponentially in recent years. He remarked that "the number of peace-operations is at an all-time high with almost 100,000 people in the field and that the number of personnel in UN peace operations could increase by as much as 40 percent."<sup>30</sup>

Overall, the UN has evolved into a globally reputable organization with 189 member states, with numerous interventions into world crises, authorized by at least one of the UN's governing bodies.<sup>31</sup> This is an example of the perceived legitimacy that the UN peacekeeping missions have acquired in recent history and the fact that this institution, by its expertise, should continue to be utilized in humanitarian interventions.

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<sup>28</sup> Ibid.

<sup>29</sup> Security Council, "Peacekeeping Operations" <<http://www.un.org/Docs/scinfo.htm>> (accessed July 29, 2002).

<sup>30</sup> United Nations. UN News Center. 16 February 2007. *Ban Ki-Moon Details Plans For Restructuring UN Peacekeeping Disarmament Work* <<http://www.un.org.apps/news/story.asp?NewsID=21601&Cr=restructuring&Cr1=>> (accessed 19 February, 2007).

## **The North Atlantic Treaty Organization**

The North Atlantic Treaty, signed on April 4, 1949, created a cooperative relationship between ten European and two North American independent nations, whereby each would defend themselves individually and collectively.<sup>32</sup>

There are currently 26 members of NATO.<sup>33</sup> The treaty itself is based upon the principles and missions of the UN Charter; and in most cases; it directly conforms to it. Out of the treaty and its member nations, the organization has evolved into a framework for forging higher trust and better working relationships within Europe. During the latest 50th anniversary, its leaders acknowledged that it has changed and adapted to new security concerns as well as its enlargement process, crisis management, peace-keeping and peace-support missions. Not all of this has met with approval of every nation. For example, Russia opposed the NATO intervention in Kosovo and thereafter withdrew from participation in some of the special partnership programs.<sup>34</sup> Since the bombing campaign, NATO and Russia have again increased cooperation through the Kosovo Force (KFOR) and with the Multi-National Brigades which have US, French and German leadership.<sup>35</sup>

NATO provided the armed forces that intervened into the Kosovo crisis.<sup>36</sup> Because of the bombing campaign instituted, the organization itself came under criticism, especially from inside Kosovo and its internal competing interests. For example, in a statement by the NATO Secretary General in May 1999, he responded to the criticism that it was the actual bombing of

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<sup>31</sup> Security Council. "Peacekeeping Operations."

<sup>32</sup> NATO. *What is NATO?*. NATO On-Line Library. Sep. 2000.  
<<http://www.nato.int/docu/facts/2000/what-is.htm>> (accessed March 9, 2007).

<sup>33</sup> NATO. *NATO: The 26 NATO Member Countries*. NATO On-Line Library. 09 Feb. 2007.  
<<http://www.nato.int/structur/countries.htm>> (accessed March 9, 2007). The members are Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and the United States.

<sup>34</sup> Ibid.

<sup>35</sup> NATO. NATO On-Line Library. NATO-Russia Relations, June 2002.  
<<http://www.nato.int/docu/facts/nato-rus.htm>> (accessed March 9, 2007).

Kosovo that forced the thousands of refugees to flee the country that month. He stated that it was the repression and persecution by the Serb forces, not the NATO bombing that forced them out. Additionally, he stated that the bombing was in response to the failure of Milosevic to comply with UNSCR 1199, which demanded that he stop his military offensive in Kosovo. Two thousand unarmed monitors had been stationed there to verify compliance with the UNSCR 1199, and initially NATO troops were there as a protection force for them. In response to further ethnic massacres and continuing to break ceasefires agreed to by the Kosovars, but not by Milosevic, arranged at the Rambouillet peace talks, NATO was given the order to act. They started the air campaign on March 24, 1999. Following the start of the campaign, he pointed out that humanitarian measures were instituted as well; refugees were housed in tents, camps were built, meals prepared for 129,000, and essential food, medical supplies and other materials were shipped to the region.<sup>37</sup>

In another statement, the NATO Secretary General defended the humanitarian nature of the intervention. He stated, “To stand idly by while a brutal campaign of forced deportation, torture, and murder is going on in the heart of Europe would have meant declaring moral bankruptcy.” Now, as in 1949, we are called upon to demonstrate that values are not only something to be preached but upheld.” He also pointed out that the humanitarian action was done in close cooperation with other nations, not alone.<sup>38</sup>

The humanitarian basis for the intervention was directly addressed in a statement by General Wesley Clark, the Supreme Allied Commander of Europe. He stated the mission there in

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<sup>36</sup> NATO. *NATO: United to Succeed*, Article by the Secretary General, 2002. <<http://www.nato.int/kosovo/articles/a990521b.htm>> (accessed July 31, 2002).

<sup>37</sup> Ibid.

<sup>38</sup> NATO. *NATO: The Defence of Our Values*, Article by the Secretary General, 2002. <<http://www.nato.int/kosovo/articles/a990521c.htm>> (accessed 31 July, 2002). The NATO Secretary General from 1999-2003 was Lord Robertson of the United Kingdom; see also <<http://www.nato.int/cv/secgen/robert-e.htm>> (accessed May 7, 2007).

Kosovo was based on values: democracy, individual liberty, and the rule of law of the international community and NATO.<sup>39</sup>

Another article provided by NATO points out the legal mandate for the mission of NATO in Yugoslavia. First, the actual force in Kosovo is part of a coalition of 46,000 military personnel from 39 countries, a collective action. The article cites the authority under which they acted as a Military Technical Agreement between NATO commanders and Yugoslav commanders on June 9, 1999 and the UN Security Council Resolution 1244, dated June 12, 1999. The article also explains the strength of the NATO coalition and mutual support to ending the humanitarian crisis. This commitment was significant toward enforcing the peace and stabilizing Kosovo after the bombing campaign, which lasted 78 days and consisted of almost 40,000 sorties.<sup>40</sup>

The strength and support of this coalition and the residual legitimacy of NATO clearly added to the legitimacy of the Kosovo mission. However, the legal issues of legitimacy were much more unclear and will be examined in the following section.

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<sup>39</sup>NATO. NATO's Role in Kosovo, News Articles, *Effectiveness and Determination*, Article by General Wesley K. Clark, SACEUR <<http://nato.int/kosovo/articles/a990602a.htm>> (accessed July 31, 2002).

<sup>40</sup>NATO On-line library, *NATO's Role in Relation to Kosovo*. July 2000. <<http://www.nato.int/docu/facts/2000/kosovo.htm>> (accessed March 9, 2007).

## THE LEGAL ISSUES

The basic document for analyzing the humanitarian and legal issues is the UN Charter and the three basic articles concerning the use of force, strictly and traditionally construed, must adhere to these provisions. Section 2 (4) of the UN Charter, states that the use or threat of use of force is prohibited by any member state against any other state unless authorized under two exceptions: the right to self-defense, Article 51, Chapter VII; and with the authorization of the Security Council, Article 53, Chapter VII. These, among others, are the basic provisions used in the international law case, *Yugoslavia vs. The United States*.

Some of the provisions and limitations of the UN Charter should be examined in order to understand and analyze humanitarian intervention. Simons provides an interesting analysis of the UN Charter and its provisions. Overall, the treaty is a legal instrument, a breach of which, is illegal. The problem with this, “as with any treaty, is always the difficult question of interpretation” and which most disputes in the UN involve.<sup>41</sup> He states, that this is further complicated by the fact that the drafters were politicians, not lawyers, and the net result is a lack of timeliness and efficacy in resolving matters, especially between relatively powerful states. He states that these disputes are most often solved through the literal interpretation; however, this is not very easily accomplished because of some of the language is unclear, ambiguous and was the result of piecemeal drafting by committees that did not necessarily communicate with each other.<sup>42</sup>

What is the significance and purpose of the court, the case, *Yugoslavia vs. United States*? How was the court established and how should its decisions be viewed in this case and on any future case of this type?

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<sup>41</sup> Simons, The United Nations, 53.

<sup>42</sup> Ibid., 54.

The International Court of Justice was established in the United Nations Charter, Chapter XIV, Articles 92 through 96, making it the “principal judicial organ of the United Nations,” in which “all members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”<sup>43</sup> The reference to the Statute is the Statute of the Permanent Court of International Justice, which outlines the organization, membership, and procedures.

In viewing some of the provisions, and their relevance for an ICJ case, some relevant provisions are notable to all cases. For example, Article 55 states that the decisions are decided by a majority of judges; and Article 59, that states that its decisions are not binding “except between the parties and in respect of that particular case.”<sup>44</sup>

In order to obtain a legal opinion, in May 1999, the Federal Republic of Yugoslavia had requested the International Court of Justice in The Hague to indicate provisional measures against the United States and seven other NATO member countries that participated in the bombing campaign of April 1999. Although the court ultimately ruled that there was no jurisdiction to decide the matter, the court heard arguments as to the legality of the use of force by these countries against Yugoslavia that were relevant to deciding any future claims of this nature.

The Yugoslavian government claimed that the bombing violated the obligation to refrain from: the use of force against another state, intervention into the affairs of another state, hostility against historical monuments, use of prohibited weapons, causing considerable health and environmental damage, destruction of bridges and navigation channels, and the inflicting of physical destruction against a national group. Overall, the claim was that the use of force was unjustified, illegal and the named nations were responsible. It was asserted that this use of force was illegal in theory under traditional UN Charter provisions: Section 2 (4) and Articles 51 and

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<sup>43</sup> United Nations. UN Charter, Article 92. in *The History of the United Nations Charter, The Role of the United States 1940-1945*, Ruth B. Russell, (Washington, D.C.: Brookings Institution, 1958.), 1050.

<sup>44</sup> International Court of Justice. Basic Documents. *Statute of the International Court of Justice*. <[http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#Article\\_1](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#Article_1)> (accessed March 1, 2007).

53. However, the court case brought out that the law is still unclear whether humanitarian purposes override this rule. Also, there are some provisions under customary and traditional international law that leave this question open to future interpretation depending on the prevailing political situation.

In the ICJ case, the relevant provisions of the Charter of the United Nations were Article 2 (4), 51, and 53.<sup>45</sup> Under Section 2 (4) of the UN Charter, the use or threat of use of force is prohibited by any member state against any other state unless authorized under two exceptions: the right to self-defense, Article 51, Chapter VII; and with the authorization of the Security Council, Article 53, Chapter VII.<sup>46</sup>

In order to prove the legality of the NATO action, it should have proved that the use of force was an authorized exception under the UN Charter's prohibition on force (Article 2, paragraph 4), through either the self-defense exception, (Article 51) or through the authorization of the Security Council. Without meeting these provisions, it must have proved it was a legal use of force under humanitarian intervention. The doctrine of humanitarian intervention as a legal option is controversial, and is viewed by many eminent legal authorities as a political doctrine. The law is open to interpretation and appears to be unclear and based on evolving norms and subject to the prevailing political situations.

Yugoslavia asserted several arguments against the legality of the intervention. Yugoslavia argued that there was no legal basis for use of force at all; specifically, that the attack on its territory violated Article 2, paragraph 4 of the UN Charter. It argued that the plain language of the provision literally excluded force with the phrase "against the territorial integrity or political independence of any State" and, that there is no evidence of preparatory work that

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<sup>45</sup> International Court of Justice, (ICJ) *Yugoslavia v. The United States of America* <[http://www.icj-cij.org/icjwww/idocket/iyall/iyall\\_cr/iyall\\_icr9914\\_19990510.html](http://www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_icr9914_19990510.html)> ( ICJ, May 10, 1999).(accessed March 9, 2007).

<sup>46</sup> United Nations, UN Charter. Signed 26 June 1945. See Appendix.

points to an intended exception for special intervention.<sup>47</sup> It further argued that there is no basis in international law for a change in this through custom either, and if there is thought to be, there is no evidence of it.<sup>48</sup>

Also in support of this position, Ian Brownlie, (who represented the Federal Republic of Yugoslavia in this case), stated in another work that the threat of use of force is “prohibited as a principle of the Charter in Article 2, paragraph 4.”<sup>49</sup> The phrasing ‘against the territorial integrity or political independence of any States’ was inserted to strengthen the guarantee against intervention.” He also reiterated in this treatise that the only exception is the provision under Article 51, the self-defense position.<sup>50</sup>

A similar argument supports the idea that this action is not legal. In a treatise by Henkin, he asserts that the framers intended to outlaw aggression and war. Further, the purpose of the treaty was to encourage and reinforce the peaceful resolution of disputes, to encourage cooperation, and preserve the right to be left alone.<sup>51</sup>

Yugoslavia argued that Article 51 was not met because the intervention did not qualify as self-defense action and it was not authorized under the authority of the Security Council. This is a fact-specific argument. In this case, the intervention was authorized under UN General Assembly resolutions, so this article was not met. However, O’Brien points out that the right of self-defense can be stretched to include direct as well as direct, anticipatory, pre-emptive

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<sup>47</sup>ICJ, *Yugoslavia vs. United States*.

<sup>48</sup>Ibid.

<sup>49</sup>Ian Brownlie, *The Rule of Law in International Affairs* (The Hague: Martinus Nijhoff Publishers, 1998), 198.

<sup>50</sup>Ibid.

<sup>51</sup>Louis Henkin, *How Nations Behave, Law and Foreign Policy*. 2nd ed. (NY: Columbia Univ. Press, 1979), 136-137.

aggression, which falls under a self-help theory of aggression; however, this doctrine is still subject to Article 2, section 4.<sup>52</sup>

The next argument regarding the illegality of the intervention was under Article 53 of the UN Charter. Yugoslavia argued that under this article, the Security Council is the only authority for instituting force under the provisions of Chapter VII of the treaty, that it is specifically prohibited to take action without it. It stated, that because NATO acted without this authorization, this Article is not met.<sup>53</sup>

“GA Resolutions fall short of furnishing a legal basis, since they are not legally binding.”<sup>54</sup> However, O’Brien points out that because of continual stalemate between superpowers, this type of approval has never materialized under Chapter VII; it is only theoretical and the issues must be thrust onto the General Assembly for any collective security action. He cites the Korean War as one such intervention that was accomplished under the approval of the General Assembly.<sup>55</sup>

Yugoslavia’s third argument was that there is no legal doctrine of humanitarian intervention, and that this is not an express or implied exception under the UN Charter Articles 2, paragraph 4, 51 and 53.<sup>56</sup> Yugoslavia asserted that there was no such doctrine in customary international law or in the UN Charter; it cited several legal scholars such as Dinstein, Randellzhofer, and Simma, who believe that it is incompatible with the UN Charter; and, it is not

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<sup>52</sup> William V. O’Brien, *U.S. Military Intervention, Law and Morality* (Washington, D.C.: Sage Publications, 1979), 30. According to the preface, O’Brien is a former chairman of the Center for Strategic and International Studies, Georgetown University, and is a noted legal authority on the “just war doctrine.”

<sup>53</sup> ICJ, *Yugoslavia vs. United States*.

<sup>54</sup> Clara Portela, Berlin Information Center for Transatlantic Security, *Humanitarian Intervention, NATO and International Law* <<http://www.bits.de>> (accessed on July 27, 2002).

<sup>55</sup> O’Brien, *U.S. Military Intervention, Law and Morality*, 27.

<sup>56</sup> ICJ, *Yugoslavia vs. United States*.

based on legal rights under international law.<sup>57</sup> Also, it is not considered an exception unless it is approved by the Security Council under the Articles 51 or 53 of the UN Charter.<sup>58</sup>

So, is humanitarian a legitimate doctrine in any interpretation of international law? A perspective that pre-dates the UN Charter is instructive. (Here is also where the political worlds seem to overlap with the legal worlds.) In *Intervention in International Law*, Stowell, writing during the early 1900's, asserted that there is a long history of the legitimacy of humanitarian intervention.<sup>59</sup> He referred to a treatise published in the mid-1500's that documented justified intervention to prevent the religious persecutions in France, for example. He also cited other authorities who approve the legality of humanitarian intervention, some of which are Grotius, Heiburg, Woolsey, and others.<sup>60</sup> He also cited an explicit example written in 1915, "where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized to intervene on the grounds of humanity."<sup>61</sup>

Alternatively, he named authorities that believe equally that there is no legal legitimacy to humanitarian intervention, or at least recognize its problematic nature. The principle of

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<sup>57</sup> ICJ, *Yugoslavia vs. United States*. On this point, Yugoslavia cited these three authorities, first was Professor Yoram Dinstein, author of *War, Aggression and Self-Defence*, and who "concluded that nothing in the Charter substantiates the right of one State to use force against another under the guise of ensuring the implementation of human rights." Second, was cited Professor Randelzhofer, "of Germany, in the volume edited by Bruno Simma, *The Charter of the United Nations, A Commentary*," which "considers there is no room for the concept of humanitarian intervention either in the Charter or in customary law." Next was cited Professor Bruno Simma, who "writing in the European Journal of International Law (Vol 10, 1999), regards the use of force for humanitarian purposes as incompatible with the United Nations Charter in the absence of the authorization of the Security Council." Yugoslavia further argued on the reputation of these authorities as encompassing more than 30 years of noted international legal experience.

<sup>58</sup> ICJ, *Yugoslavia vs. United States*.

<sup>59</sup> Ellery C. Stowell, *Intervention in International Law* (Washington, DC: John Byrne & Co.: 1921), 55.

<sup>60</sup> Ibid., On this point, Stowell cited Grotius, "Book II, Ch XX, XL; Vattel, Book II, Section 56, Heiburg: *Nichtintervention*, p. 14-15; K. von Rotteck: *Einmischungsrecht*, p. 11, 36; Hefter: *Volkerrecht*, Section 45; and Woolsey: *International Law*, 1 ed., 1860, Section 42, p. 91." For the complete list, see footnote 11, p. 55. Stowell also refers again to Woolsey's view of the justification of humanitarian intervention, he stated, "Professor Theodore S. Woolsey, who studied this question in relation to the intervention of the United States in Cuba," and cited his view as quoted in American Foreign Policy, New

sovereignty is the basis for these theories; every state has the right to regulate its own affairs without interference. Some of these cited are Werdenhagen, Phillimore, and Halleck.<sup>62</sup>

Still another theory cited, recognizes the problematic nature of intervention, stating that it is not a matter of law at all but of morality and policy, “above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity.”<sup>63</sup>

Another authority Stowell cited, Vattel, seemed to acknowledge the illegality of humanitarian intervention, but concedes that most states accept it to some extent in practice.<sup>64</sup> Another authority he cited is Hall, who also believes humanitarian intervention is not legal, and also concedes that it is tolerated; furthermore, if it occurs, it should be a collective action, and, if justified, is excused. To take this argument a step further, Stowell pointed out that there should be qualifications to that excusal, that there must be more important moral grounds in order to overstep legal boundaries.<sup>65</sup> Also, these reasons must be in “rare and extreme cases.”<sup>66</sup>

Another position against the doctrine is argued by Henkin, that humanitarian intervention is too easily invoked as an excuse to circumvent the prohibition on force. For example, he stated that this policy defeats the purpose of the Article 2.4 provision because there are so many human rights abuses at any given time in the world—it is too easy to use this as a front for aggression. Likewise, he argued, use of force is conceptually opposed to the idea of both international law and humanitarian rights: these problems should be solved by peaceful and diplomatic means. He

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York, 1898, p 75-76), “that intervention on the ground of humanity is justifiable as a matter of precedent, then, as well as theory.” 57-58.

<sup>61</sup> Ibid., 55.

<sup>62</sup> Ibid., 58.. On this point, Stowell cited these three international law writers of the late 1800’s and early 1900’s. Angelius Werdenhagen is cited as opposed to humanitarian intervention; Phillimore is cited as a legal commentator and scholar in an 1854 work entitled *Commentaries*; and Halleck was cited as an authority from the treatise, *International Law* who disagreed with the doctrine but “recognized the influence of humanitarian considerations.” See Stowell footnote 12, p. 58.

<sup>63</sup> Stowell, *Intervention in International Law*, 60.

<sup>64</sup> Ibid., 59. On this point, Stowell again cited Vattel as a legal scholar opposed to humanitarian intervention but on occasion has taken the opposite position. See Stowell footnote 13, p. 59.

<sup>65</sup> Ibid., 59-61.

also conceded, like several theorists that if it does occur, it should be a collective, limited and unambiguous effort.<sup>67</sup>

An interesting commentary on the legal issues of Kosovo was provided in the analysis by Byers and Chesterman. They reviewed the legal community's stance on the intervention since 1999. Their view is that the intervention was not legal and that this was the predominant legal opinion by international legal scholars at that time. But he presented a different angle for the debate; that although this was true, it does not justify closing the case on legality altogether-- this should be merely a starting point for a positive evolution in the law. This is especially important since, most of the legal scholars argued the illegality of the war based on "traditional international law."<sup>68</sup> Perhaps, he suggested, it is time to take this debate further by examining the reason why legal scholars advocate it even though it would "assume a radical change in the international legal system."<sup>69</sup> Such a concept of "exceptional legality," they asserted, might be justified because it is more applicable to modern times, principles and behaviors of nation-states; such change is now even more necessary in view as international law is in need of direction and support.<sup>70</sup>

Byers and Chesterman came to this conclusion through a series of legal analyses of both traditional and evolving norms. Starting with the Article 2(4) of the UN Charter, its prohibition on force (see text in the Appendix), he states that its "ordinary meaning is clear: the use of force across borders is simply not permitted. This meaning is supported by the UN Charter's context, object, and purpose—a global effort to prohibit unilateral determinations of the just war by

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<sup>66</sup> Ibid., 61.

<sup>67</sup> Henkin, *How Nations Behave*, 145.

<sup>68</sup> Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law, in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 177-178. The contributors list includes Michael Byers, a noted Duke University Law Professor and writer on international legal topics; Chesterman is a scholar and member of the International Peace Academy and has worked with the International Criminal Tribunal for Rwanda.

<sup>69</sup> Byers and Chesterman, *Humanitarian Intervention*, 179.

<sup>70</sup> Ibid.

vesting sole authority for the non-defensive use of force in the Security Council.”<sup>71</sup> They then argued that the two exceptions in the UN Charter to this prohibition on force were not met, either as approval by the Security Council or by the right to self-defense. On the Security Council resolution, he notes,

no such authorization to use force for humanitarian ends was provided in any of the resolutions concerning Kosovo . . . the last resolution before the intervention, Resolution 1203 of 24 October 1998, specifically ‘affirms that, in the event of an emergency, action may be needed to ensure their [the OSCE Verification Mission’s] safety and freedom of movement.’ It makes no mention of humanitarian intervention and concludes by stating that the Council remains ‘seized of the matter.’ It was thus made clear that any decision to engage in a humanitarian intervention was to be made by the Council alone, at a subsequent meeting.<sup>72</sup>

Further, they stated that the Security Council not only did not approve the war before it started, they immediately debated a resolution which would affirm its illegality after it was started. In fact, he argues, the subsequent resolution, Resolution 1244, “was limited to establishing an international security presence and civilian administration to deal with the consequences of the intervention.”<sup>73</sup> And on the self-defense exception, they argued that this would have been applicable only “upon an armed attack on the state asserting the right.”<sup>74</sup> According to this argument, NATO would not have been able to invoke this right since they were never under imminent attack by Yugoslavia and because Kosovo was never considered “a state;” invoking this right is considered to be a remedy reserved only for states. They therefore concluded that based on the UN Charter, the Kosovo war was illegal; however, they do consider whether the “right to intervene had developed in customary international law.”<sup>75</sup> They argued that it does not, because the treaty is clear and has precedence over this; furthermore, if it did, it would need to have risen to the level of “jus cogens.” They stated, in order for it to have risen to

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<sup>71</sup> Ibid., 181.

<sup>72</sup> Ibid., 182.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid., 182.

<sup>75</sup> Byers and Chesterman, *Humanitarian Intervention*, 182.

this level, it would have to have become a common practice among states; in this case it was not.

They asserted that from the cold war to the present, there have only been three interventions that

might have been justified on a humanitarian basis—Bangladesh, Cambodia, Uganda—were justified on other terms, while intervention in Liberia, Somalia, Bosnia, Haiti and Rwanda were conducted on the basis of Security Council Resolutions, and in some cases also at the invitation of the target state.<sup>76</sup>

Byers and Chesterman cited other reasons why not only was the intervention illegal perse under the UN Charter; no jus cogens existed and none seemed to be moving in that direction. In fact, they stated that many other states were opposed to it or were not explicitly in favor of it, that “the 133 developing states of the G77 twice adopted declarations unequivocally affirming that unilateral humanitarian intervention was illegal under international law.”<sup>77</sup>

Regarding the political nature of intervention, authorities have documented that humanitarian intervention is not legal, but tolerated, especially because of pressure from “public opinion and the attitude of the powers.”<sup>78</sup> If this is true, the humanitarian intervention into Somalia in 1993 is an example of how swiftly and powerfully public opinion can involve political pressure for intervention as well as for abandonment of humanitarian intervention. Mark Bowden observed that, as more people witness world events from media, the pressure may become more pervasive in the future, and as the world’s only superpower, there is a sense of obligation to not stand aside and let genocide happen.<sup>79</sup> Ideas such as this possibly further legitimize the legality of intervention, at least from a political perspective.

A similar perspective points out the interplay between law and policy in American interventions. O’Brien pointed out that America has a long history of “contradictory attitudes and practices in this area.”<sup>80</sup> He states that this idea virtually started with the beginnings of the country, the idea that the New World should be immune from the Old; that, the New World

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid., 183.

<sup>78</sup> Stowell, *Intervention in International Law*, 61.

<sup>79</sup> Mark Bowden, *Blackhawk Down* (NY: Penguin Press, 2000), 354.

should be free to interfere, if necessary, within its hemisphere. This idea became evident in foreign policy starting with the Monroe Doctrine of 1823. So rationalized, or just intervention, became somewhat of a norm, because one side would claim to be entitled to an exception. He also noted that hegemonic motives are rarely acknowledged when discussing the justification for intervention, when in fact, it frequently is a powerful motive. So as America has grown, so has its intervention expanded as well as its influence on international norms. He also pointed out that while a country may proclaim a policy of non-intervention, it may practice the opposite policy, the former Soviet Union is an example of this.<sup>81</sup>

So the actual legality of humanitarian intervention is as unclear now as it probably was in 1946, and still riddled with political and power overlaps. The lack of clarity on this issue is a still problem; as explained by Lodico, it is not “concrete.”<sup>82</sup> She argued that because the moral, just-war idea has formed the basis of the actions within the last decade, any such action should be scrutinized carefully. She pointed out numerous factors that should be examined: whether alternatives to force were sought; whether the state has given approval; the amount of force was proportional; the interests of the states intervening were not involved; the purpose for the intervention must have been legitimately humanitarian; use of force should have been a last resort; and it must have been collective, not unilateral action.<sup>83</sup>

So, the Kosovo intervention was probably not legal under the above-mentioned UN provisions because the prohibition on the use of force is explicit and almost absolute except in cases for self-defense or when collectively approved through the Security Council. In this case, the Security Council did not authorize the NATO intervention; it was a result of General Assembly resolutions. Therefore, the exception authorized under Article 53 is not met.

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<sup>80</sup> O’Brien, *U.S. Military Intervention, Law and Morality*, 9.

<sup>81</sup> Ibid., 9-11.

<sup>82</sup> Yvonne Lodico, “The Justification for Humanitarian Intervention: Will the Continent Matter?” *International Lawyer* 3 (2001): 1027, 1037.

<sup>83</sup> Lodico, “The Justification for Humanitarian Intervention,” 1027, 1037.

The exception under Article 51, self defense is not met, because there was no intrusion threat into NATO countries' borders. Because neither of these exceptions applied the only legally valid basis would have been if the General Assembly resolution and following support legitimized it or the action constituted a type of pro-active self-defense. Both of these are interpretations that may be implied through usage. If these are not satisfied, NATO must have proved that the use of force was for humanitarian reasons and that that was a legitimate use of force. This is not the traditional interpretation of the international law.

But recent interventions have shown that the law may be evolving in this direction for many reasons. First, media coverage of areas reaches large amounts of people, who in turn influence policy makers toward taking humanitarian missions. This is particularly true for the developed and democratic allied societies. Public opinion helped persuade and legitimize the Somalia intervention, and it also contributed to the end of that mission. This shows the strength of any prevailing political opinion on any legal issues confronted by the countries that have the means to intervene. However, this is assuming the veracity of the humanitarian, anti-genocide measures. Such measures can only be proven with more data and factual information by an impartial fact-finding body. (This is especially necessary if the intervening force could itself be alleged as committing genocide through its very intervention.) A final legal conclusion would have to rest on this alone. But this is unlikely to be achieved without extensive investigations, verifications, and fact-finding by an impartial body. And it is imperative that such action was legitimately humanitarian for this to be a legal exception. And it is also imperative due to the moral underpinnings of this doctrine that both the intervening forces and the countries that implement it maintain the moral high-ground at all times in all actions. And indeed, the moral element will be scrutinized in the world's opinion--if not in fact-finding bodies of the UN.

So, in the traditional interpretation of the important provisions and intent of the UN Charter, which places the utmost value on non-aggression, the NATO intervention into Kosovo was probably not legal. If, on balance, however, this was truly a humanitarian mission and the

only way to have achieved it was with force, the action may, at the same time, have served an equally important humanitarian principle by preventing genocide from re-occurring within Europe. But as follows, there are further arguments to be made on the legality beyond the traditional interpretations of the UN Charter.

An argument on the principles and intention of the U.N. Charter is explored by James Terry in a 2004 article. He states that humanitarian intervention, especially as was the case with Kosovo, should be legally recognized at least in part on this basis.<sup>84</sup> He argued that this is applicable under two conditions: when the intervention “would not run afoul of Article 2(4) provided they do not affect the ‘territorial integrity’ or ‘political independence’ of the state against which they are directed and when the U.N. Security Council is unable to act because of a potential veto.”<sup>85</sup> But, he pointed out that this must be done within the context of a coalition of states and the threat of a Security Council veto. This is in keeping with the spirit of the Charter: that human rights are to be protected; he argues that this is exemplified in the Preamble, which “focuses on the rights of the individual vice the rights of nations . . .”<sup>86</sup> He cited the Preamble, arguing that this principle goes to the very purpose of the U.N. Charter in the first place: “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”<sup>87</sup>

Terry pointed out that it was this “principles” argument that was used by President Clinton, in authorizing the intervention itself. He cited a statement made by President Clinton, “by acting as we did, we helped to vindicate the principles and purposes of the U.N. Charter . . . principles often collide, and tough choices must be made.”<sup>88</sup>

Since the 1999 war in Kosovo, there have been many debates over the legitimacy of the use of force for humanitarian intervention. As legitimacy is more than mere legality; the moral

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<sup>84</sup> James P. Terry, “Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism,” *Army Lawyer* (August 2004): 1.

<sup>85</sup> Ibid., 3.

<sup>86</sup> Terry, “Rethinking Humanitarian Intervention.”

<sup>87</sup> Ibid.

argument should also be considered. This is especially the case, when as Lodico asserted, the *jus cogens* argument of prevention of genocide is one that is based on it being “manifestly illegal” and “violations of human rights such as those against slavery, torture, and genocide are violations of *jus cogens* rules.”<sup>89</sup> Further, as she explained, the moral issues give rise to the idea of a just war “normative theory;”<sup>90</sup> Taking her argument a step further, however, in this way it would be seen as an issue which “legitimizes” rather than legalizes humanitarian intervention even though the crux of the public debate seems to coalesce within the intersection of rights of the nation-state, sovereignty, legitimacy, legality, ethics, politics and morality. The moral issues follow.

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<sup>88</sup> Ibid.

<sup>89</sup> Lodico, “The Justification for Humanitarian Intervention.”

<sup>90</sup> Ibid.

## THE MORAL ISSUES

Carl von Clausewitz theorized that the “moral elements are among the most important in war.”<sup>91</sup> This could be interpreted to demonstrate the connection between the psychological and ethical forces in war. Likewise, the importance of the moral issues in humanitarian intervention can not be underestimated; especially if this is the cause for intervention in the first place. For this reason, moral issues should be considered in any future campaign planning. An examination of some compelling writers on this subject is instructive with regard to future interventions.

Phillips presented an analysis of the moral dimension of intervention since the end of the cold war: all interventions have an inherent moral dimension.<sup>92</sup> An in-depth examination of the war in Kosovo provides a case study of the moral issues involving the use of force for humanitarian intervention. In doing so, it will become apparent that it is difficult to separate these two issues. There is an inherent danger in this as well, since clarity and separation in these are needed in order to discern legitimacy of humanitarian intervention. This dilemma only adds to the problem: is it a legal problem, a moral problem, or both? The answer is unequivocally, both.

In *Virtual War*, Michael Ignatieff raises some issues regarding the moral and legal aspects of the Kosovo intervention. The moral connection between these elements in the doctrine of humanitarian intervention is key, but related the moral dimension as more important.<sup>93</sup> He explained this by use of the concept of “virtuality.” What is meant by virtual? A dictionary offered four definitions:

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<sup>91</sup> Carl von Clausewitz, *On War*, ed. Michael Howard and Peter Paret (NY: Alfred A. Knopf, 1993), 216.

<sup>92</sup> Robert L. Phillips and Duane L. Cady, *Humanitarian Intervention: Just War vs. Pacifism* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1996), 11.

<sup>93</sup> Michael Ignatieff, *Virtual War: Kosovo and Beyond* (NY: Picador, 2000), 199.

“being such in essence or effect though not formally recognized or admitted; of, relating to, or using virtual memory; of, relating to, or being a hypothetical particle whose existence is inferred from indirect evidence; being on or simulated on a computer or computer network; occurring or existing primarily online: of, relating to, or existing within a virtual reality”<sup>94</sup>

Ignatieff used several examples to explain why he believed the Kosovo intervention was virtual. First is because it was a bombing campaign. The nature of bombing from high altitude separates the parties at such a distance so as to appear that the targets are, in a sense not real. He asserted that there is a danger that this will lead or has led to emotional detachment, thereby increasing the chance of war in the future.<sup>95</sup>

Another two reasons why he asserted the war was virtual was because of the legal and political context. He viewed its legality as questionable or “ambiguous” because neither the United Nations nor the governments of the NATO countries that participated expressly approved it.<sup>96</sup> In his view, the legal issues present problems of their own and only generate further problems. This, along with the political issues is dangerous because, as he stated, political issues can become virtual in themselves and can further be used to create a justification for war. So, in this sense, he is implying that humanitarian intervention, especially in this contemporary timeframe has the potential to be used to justify, even “to lure citizens into wars that end up abusing the very rights they were supposed to defend.”<sup>97</sup>

One of the bases for his legal viewpoint is the lack of consent of China and the Soviet Union for the “right” to intervene; he states, “it has no status (humanitarian intervention) in customary or statutory international law. It prevails simply because the West has the power to enforce its writ.”<sup>98</sup> As was argued in the previous section, this is open to debate. The nature of international law does seem to be evolving in the direction for humanitarian intervention,

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<sup>94</sup> Merriam-Webster Dictionary On-line, <<http://www.m-w.com/dictionary/virtual>> (accessed 12 January 2007).

<sup>95</sup> Ignatieff, *Virtual War*, 3-4.

<sup>96</sup> Ibid., 4.

<sup>97</sup> Ibid., 6.

especially when established criteria are met; for example, it is conducted with a coalition's consent and backed by some degree of at least General Assembly approval.

He cautioned that future war will not seem real and hence will be a way of broadening violent conflict and increasing likelihood of war. But this warning should be viewed in context; use of humanitarian intervention for standoff wars though, is his perspective that presents its own set of problems and implications. He presented a slippery-slope argument implying that it may become too easy to justify war if technology prevents a nation's people from taking a more personal part of it. Accordingly, it devolves the nature of war and reduces the moral issues from being squarely faced: "violence which moralizes itself as justice and which is unrestrained by consequences."<sup>99</sup>

Since the book was published in 2000, it is questionable whether this theory is confirmed; since then, six years have passed and the U.S. has participated in two wars that intensively use ground forces and have resulted in more than three thousand deaths. The decision to go to war in Iraq and whether the Congressional debates allowing it were "virtually" agreed upon is still undecided. If war had (by Spring 2002), become easier to get involved in because of technology is also debatable; but one thing is certain, Operations Iraqi Freedom and Enduring Freedom were not resorted to as humanitarian interventions.

As for the future virtuality, he stated, (referring to Kosovo), it is a possibility that the "impunity" with which the war was waged could have an effect of setting a precedent for the next ones.<sup>100</sup> That is, in the future, waging war will have become too easy, where a separation of the hardships will lead to a lack of realization of the horrors and hardships of war imposed on the ground. For example, he stated from his observation, NATO commanders "improvised an air war

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<sup>98</sup> Ignatieff, *Virtual War*, 162,163.

<sup>99</sup> Ibid., 163.

<sup>100</sup> Ibid., 5.

without a ground component.”<sup>101</sup> So, in this way, he sees the Kosovo bombing as hurting the possibilities or constraining the future if this is an indication of the new way of war. But he seems to base this on the fact that technology and morality together are not evolving in synchronicity with each other. Neither are the legal principles that must guide the current United Nations structures and functions. This is the basis of his argument, that there is a “paradox” between the morality of war and the technological advances that make war possible from a distance.<sup>102</sup>

This begs the question of whether this was a human rights problem in the first place. It would seem that the basic assumption about humanitarian intervention is the fact that basic human rights require intervention in order to protect or restore. This should be considered as a part of the perspective that each side brings to their interpretation of the humanitarian need as reflected in the differing parties. Ignatieff brings up some issues that show some of the disconnected interpretations of both Milosevic and the American side during the lead up to the war. It is an example of the internal American view of what was happening in Kosovo, as compared to what the diplomats and observers were seeing, and what Milosevic’s intentions appeared to be.<sup>103</sup> He also criticized the US for not intervening earlier and places blame on the US for actually not paying enough attention to the human rights issues, at least in the early stages of the conflict; that “Western governments were looking the other way” while the Serbs were trying to prevent a “secessionist movement.”<sup>104</sup> He believes that this provided implicit approval and potential “ratification” to Milosevic’s actions; that “by the summer of 1998, Western governments were at last wakening to the fact that Kosovo was no longer a human rights issue:

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<sup>101</sup> Ignatieff, *Virtual War*, 6.

<sup>102</sup> Ibid., 7.

<sup>103</sup> Ibid., 57.

<sup>104</sup> Ibid.

there was a full scale civil war in the province, threatening to spread to other states in the region.”<sup>105</sup>

Adding to his critique, the end result was that the US did get involved in a way that resulted from the KLA “strategy designed to incite the Serbs to commit massacres that would eventually force NATO to intervene” based on the playing to American and the neighboring countries’ need for stability in the region.<sup>106</sup>

These ideas lend weight to the larger moral issues, but moral issues are a part of every conflict. It would seem from this moral angle, not the legal or political that Ignatieff argued against the Kosovo war. But surprisingly, he stated that this is the very reason it was controversial in the first place. He argued that public opinion for a humanitarian war, or a war “in the name of values” requires more effort to obtain support but then in doing so he summarizes the key legal issues, sovereignty versus intervention.<sup>107</sup> So, Ignatieff’s argument merges the moral and legal so much that it is difficult to separate them. What he does show is the lack of agreement on what moral was in regard to the intervention. It is clear that there was no consensus who or what was truly right morally, only that there was a moral problem.

What was it about Kosovo that made a humanitarian intervention appropriate or necessary? This ultimately will depend on prevailing political interests. Ignatieff summarizes the argument for humanitarian intervention that Prime Minister Tony Blair asserted prior to the Kosovo bombing; Blair had called for a “revision” of the earlier United Nations doctrinal prohibition on force for self-defense or for sovereign immunity. He recounted Blair as announcing a proper legal test for whether humanitarian intervention is necessary and that Kosovo met this test: if there is genocide resulting in mass upheavals of refugees. Further, if this was the case, military options should be considered after diplomatic means are exhausted and if

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<sup>105</sup> Ignatieff, *Virtual War*, 58.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid., 72-73.

the interveners have critical interests. Ignatieff attributed this speech to have launched the moral debate of the humanitarian intervention.<sup>108</sup>

Ignatieff used an interesting dialogue as a means to discuss these intersecting legal and moral issues, where it is often difficult to divide them. In response to the argument by Robert, he envisioned the issue of whether humanitarian intervention is legitimate as whether human rights override state sovereignty. He framed the issue thus:

You maintain that there is ‘no international consensus on the standards expected of states in dealing with their own subjects.’ This is not the case. Since Nuremberg, since the Universal Declaration of Human Rights, there has been a set of international norms on the internal conduct of states which those who sign these conventions—and Yugoslavia is a signatory—are supposed to abide by. So the problem about intervention does not lie, as you suppose, in the relativity of international norms. Serbia’s violation of these norms in Kosovo is not a matter of serious dispute. These norms exist; the problem is whether an international right of intervention should trump state sovereignty in the case of abuses in Kosovo.<sup>109</sup>

He goes on to say that the Kosovo intervention was justified by meeting the criteria that massive amounts of people were forced from their homes creating a mass, forced migration and because even though a Security Council agreement should have been required, it would not have been possible because of the inherent veto power. He also phrases this as something that “should” have happened in order to reinforce the idea that sometimes even force itself is required; otherwise “there is no future for law.”<sup>110</sup>

Ignatieff seemed to be approving of the legitimacy of the war itself, at least on the basis of humanitarian intervention. Where he opposes it was the conduct of it, the “virtuality” of it and which is where he believes the moral problems arise. Accordingly, he believes that this is the

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<sup>108</sup> Ignatieff, *Virtual War*, 72-73.

<sup>109</sup> Ibid., 77.

<sup>110</sup> Ibid., 79.

beginning of the larger problems; that there may be no end to wars of this type, a hybrid type of war—one that is justified outside of legal caveats and may be too easily resorted to with high-technology, stand-off weapons. This is warning of a dangerous combination: Western states with long range weaponry and power to use it despite the world communities' explicit approval. He argued, this could become “violence which moralizes itself as justice and which is unrestrained by consequences.”<sup>111</sup> Further, a western government could find itself in wars too easily and with little damage to itself, it could be “sold to voters with the promise of impunity.”<sup>112</sup> And he stated that this is particularly dangerous if the selling of the war is couched in language of human rights and morality. Further, such “virtual war” could escape the constitutional scrutiny that time and elected bodies would require in properly deliberating and authorizing the action.<sup>113</sup>

Ignatieff argued further that this lack of debate and well-founded war authorization within the democracies is a far greater danger than those outside the democracy, for example, within the United Nations. This becomes a process of “virtual consent” where the people do not expect or require their elected leaders to do their proper job of debating issues, thereby relegating war approval to a few leaders; thus he asserts that this

decay of institutional checks and balances on the war-making power of the executive has received almost no attention....this suggests that citizens no longer even care whether their elected politicians exercise their constitutional responsibilities . . . we have allowed ourselves to accept virtual consent in the most important political matter of all: war and peace.<sup>114</sup>

So this, he asserted, is where the heart of the debate should be, in order to prevent virtual wars from proliferating. It also seems a wrong priority to discuss the legitimacy of Kosovo bombing based on the UN authorization alone, when they do not provide the actual troops.<sup>115</sup>

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<sup>111</sup> Ignatieff, *Virtual War*, 163.

<sup>112</sup> Ibid., 179.

<sup>113</sup> Ibid., 180.

<sup>114</sup> Ibid., 180-181.

<sup>115</sup> Ibid., 181.

What are the ramifications for future humanitarian interventions cases? In a review of the Ignatieff book, Kalev Sepp asserts that military planning will require considering these “seeming contradictions” between use of force and morality as a balancing act. He asserts that in the Kosovo war, there were sub-issues generated by the larger moral ones. Even though he did not agree with Ignatieff’s technological arguments, he does acknowledge that his arguments bring attention to the debate on human rights and ethics in war.<sup>116</sup>

Intervention is an inherently international issue; however, the rise of the United States as a sole superpower since the cold war, brings the question of intervention into a new light. For example, in *Agency and Ethics*, Lang, analyzed the Somalia intervention on its moral justification from the uniquely American perspective. He stated that the most popular justification is that there is a duty owed, a moral one, for a stronger state to help a weak one. He posited that there are two questions that should be asked if an intervention is appropriate or necessary; “what exactly are the moral duties of a nation, and how did this intervention fulfill those duties . . . and what is it about the United States in 1992 that made it responsible for solving these problems?”<sup>117</sup> The implication is that as the U.S. grows stronger and more prosperous, there may be a perceived duty to help other nations in need. He believes that this was the case with Somalia, as recounted from the speeches by Presidents Bush and Clinton. Lang focuses on the “normative” aspects of intervention, using the Somalia action as an example when he states:

Neither Clinton nor Bush ever clearly articulated a basis for the overall ethic of the intervention. But there appear to be two key aspects to the action: feeding the hungry and rebuilding a nation. Nor should these two ethics be seen as confined to the two different administrations. Bush and his administration built the foundations for the policy of nation-building, and Clinton emphasized the success of feeding the people as proof of the wisdom of the mission. These two aspects of the intervention play a key role in explaining its overall normative element.<sup>118</sup>

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<sup>116</sup> Kalev Sepp, “War by Any Name,” Book Review. *Joint Forces Quarterly* (Spring 2002): 111.

<sup>117</sup> Anthony F. Lang, *Agency and Ethics* (Albany, NY: State University of NY, 2002), 162.

<sup>118</sup> Ibid., 163.

According to this, it seemed that the unstated justification was to help the symptoms (the starvation and lack of water or agriculture, forced emigration) and the underlying problem (lack of government) that were caused by the devastation of the civil war. Through the evolution of that mission, Lang explains, the mission initially focused on assistance in humanitarian needs to the attacking the problem of building a self-governing state.<sup>119</sup>

In order to better define humanitarian intervention, it is useful to determine how it differs from other interventions. How is humanitarian intervention distinguished from intervention itself? Robert Phillips' discussion of the concept is instructive. In the "Ethics of Humanitarian Intervention," Phillips traced the evolution and foundations of intervention and shows that intervention has always had a moral dimension.<sup>120</sup> He stressed that it has a long history; however, it has become a controversial issue since the end of the Cold War; he stated, "the intervention of one state in the affairs of another is not new but has taken on a greater urgency and sharper focus in the decade following the demise of the Soviet Union."<sup>121</sup> He argued the reason for this is two-fold; first it was part of the "balance of power" which made it a geopolitical problem, and second, it was an ideological problem, a continuation of the power struggle between Britain and continental Europe since the middle ages, over any one, dominant hegemon. According to Phillips, this was against a background of a looming nuclear threat during the Cold War; it was a way of treading lightly into the affairs of a peripheral state, while trying to avoid setting off a nuclear strike. However, he stated, this actually could have encouraged the Soviet counteraction, which in turn created another cause for intervention in some other area around the "containment" area. Further, it was considered "a morally superior alternative to World War III,

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<sup>119</sup> Lang, *Agency and Ethics*, 163, 169.

<sup>120</sup> Phillips and Cady, *Humanitarian Intervention: Just War vs. Pacifism*, 1.

<sup>121</sup> Ibid.

yet balance of power invites a multiplicity of conflicts as each side probes the weak points of another.”<sup>122</sup>

The key point to Phillips argument is not the efficacy of the intervention, nor the basis for it, but the secondary effects that might be derived from it; for example:

interventions throughout the cold war were often counterproductive. Many small third-world nations became, however willingly, cold war pawns whose development was stifled or set back by the game of geopolitics. Ethiopia, Somalia, and Angola are obvious cases, as are Cuba and Nicaragua, but there are many others. The major powers did not escape either. Vietnam and Afghanistan turned sour when the would-be beneficiaries of intervention proved ungrateful or uncomprehending. . . . there is often a very large gap between the (sometimes) good intentions of the interveners and the carrying out of an operation. There are many good reasons for this, the primary one being that an army is an extremely blunt instrument for carrying out an act of charity and many good intentions become lost in the fog of war. We must be clear at the outset that there are no ‘surgical strikes’ and that ‘limited objectives’ rarely are. An analysis of interventions must keep clearly focused not only on intentions (where most of the public debate seems to be) but also on means and likely outcome.<sup>123</sup>

Here is where Phillip’s and Ignatieff’s arguments come together in a commentary on the moral nature of modern war. In Phillips view, interventions have many dimensions: the “intent” aspect, (which can sometimes be well-meaning and sometimes hegemonic, or both) and the hoped-for result. And this is especially the case for any type of virtual war that Ignatieff describes, where bombing with air power on selected targets is expected to bring a certain effect.

It is clear that humanitarian intervention, and any intervention for that matter, has an inherent moral dimension. The problem however, is who or what is right with regard to the moral side. This would require a value judgment and can depend on a multitude of factors such as the prevailing political opinions, the historical context, prevalent attitudes and the support from the public. A similar result was concluded in the previous section; legal conclusions also rest on moral factors and on the prevailing political situation. The question remains how will it be viewed in the future when the justification and outcomes do not seem universally legal or moral to all concerned? Some considerations for the future are outlined in the next section.

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<sup>122</sup> Phillips and Cady, *Humanitarian Intervention: Just War vs. Pacifism*, 1, 2.

## IMPLICATIONS FOR THE FUTURE

In viewing humanitarian intervention through these legal and moral “lenses,” a perspective that can be applied to other intervention is evident. For example, although many elements are different from Kosovo, what is it about Iraq in 2003 that made it not a case for humanitarian intervention? Roth explored this question from the perspective of human rights. He explained, this humanitarian intervention is a concept that has become virtually extinct; that is was product of a certain period of time where world powers had the “luxury” to worry about it.<sup>124</sup> That is, the relatively quiet time between the cold war and the increase in global terrorism enabled the world to positively view interventions in a humanitarian pro-active way. He also noted that the humanitarian interventions in Africa during those times were conducted in accordance with the Security Council as well as the agreement of the host governments.<sup>125</sup>

Roth also argued that one should be careful in calling missions humanitarian; he noted, although these African missions were humanitarian in name, there was considerable variation in the humanitarian character of the missions. This is an important component in any future planning, some missions will highlight this, and some will assume this role as a side issue.

Roth applied this to Iraq, explaining that the humanitarian basis of the mission was not stressed at all except in a lesser role as to justification. He explained the lack of Security Council approval and lack of invitation also contrast with the African interventions. He stated that this became a renewed justification in 2004 and that there is a danger that this will “give humanitarian intervention a bad name” for the reason that it simply was not a real humanitarian intervention.<sup>126</sup>

In forming a paradigm of what humanitarian intervention should be like there are three

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<sup>123</sup> Phillips and Cady, *Humanitarian Intervention: Just War vs. Pacifism*, 3.

<sup>124</sup> Ken Roth, “War in Iraq: Not a Humanitarian Intervention,” in Human Rights Report 2004, <<http://hrw.org/wr2k4/3.htm>> (accessed 28 January 2007).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

elements: first he stated that there should be approval from the host government. Second, if the host government does not approve, the use of military force should be resorted to only if genocide or “large-scale murder” must be prevented or stopped. On this point he would agree with Ignatieff. The risk of causing more overall damage than the genocide itself; that war, “in theory can be surgical, but the reality is often highly destructive, with a risk of enormous bloodshed” and “should be reserved for the most dire circumstances.” He stated that such was not the case in Iraq in 2003; that under Saddam Hussein’s rule the mass murders he had committed had actually declined compared to the level during the 1980’s. Further, he stated that no such mass murders were occurring in the time prior to the Iraq war such as the “Anfal genocide, in which the Iraqi government slaughtered some 100,000 Kurds.”<sup>127</sup> He thus distinguished between past and future; there was no case made for preventing genocide from happening then either. He stated,

no one was planning imminent mass killing, and no evidence emerged that it was. There were claims that Saddam Hussein, with a history of gassing Iranian soldiers and Iraqi Kurds, was planning to deliver weapons of mass destruction through terrorist networks, but these allegations were entirely speculative; no substantial evidence has yet emerged.<sup>128</sup>

However, he argued, this does not mean that there were not killings and that Hussein should not have been punished or indicted; he pointed out the difference in the gravity of both situations; intervention by a war should be used only when the “mass slaughter should be taking place or imminent.”<sup>129</sup> In fact, he argued that the appropriate remedy would have been to indict Hussein in an international criminal court, such as was done with Slobodan Milosevic, that “an international indictment profoundly discredits even a ruthless, dictatorial leader.”<sup>130</sup> He also offered the fact that the international community not doing so for Hussein, enabled him “to rule without the stigma” that “tends to undermine support for the leader, both at home and abroad, in

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<sup>127</sup> Roth, “War in Iraq: Not a Humanitarian Intervention.”

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

often unexpected ways.”<sup>131</sup> For not holding Hussein legally or morally accountable in some form, he holds the international community as well as the Security Council responsible.

Also, he stated, in order for this to have been a truly humanitarian mission, it should have a “dominant humanitarian motive.” In this case, he argued, the prevailing reason for the “prelude” to the Iraq war were the threats of Iraq’s use of weapons of mass destruction, connection to terrorism, non-compliance with Security Council resolutions on weapons verification, and the possibility of instituting democracy. For this reason, he believes that any assistance or need for the Iraqi citizens were peripheral to these four; therefore, this precluded justification on humanitarian grounds. He believes that if this had been the case it would have set the groundwork for greater ability in assisting the people. For example, he argued

It was entirely foreseeable that Saddam Hussein’s downfall would lead to civil disorder. The 1991 uprisings in Iraq were marked by large-scale summary executions. The government’s Arabization policy raised the prospect of clashes between displaced Kurds seeking to reclaim their old homes and Arabs who had moved into them. Other sudden changes of regime, such as the Bosnian Serb withdrawal from the Sarajevo suburbs in 1996, have been marked by widespread violence, looting, and arson.<sup>132</sup>

So, he suggested that keeping the best interests of the Iraqi people in mind would have probably prevented many mistakes, at least in planning. He argued that such an approach would at least be better suited to planning for worst case scenarios and would raise the stature of the U.S. image in the international community. Accordingly, this approach would also keep the U.S. options open for any future claims of a humanitarian mission.<sup>133</sup>

Heinze, took a similar view to Roth; he believes that there is some case to be made of viewing the Iraq war as a humanitarian intervention based on the actual result, the removal of a

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<sup>131</sup> Roth, “War in Iraq: Not a Humanitarian Intervention.”

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

dictator. He argued that the Iraq war “conforms to many of the international norms (legal or otherwise) previously invoked by both scholars and governments to justify past humanitarian interventions.”<sup>134</sup> He believes this is important, because if it is, it could be construed as an “expansion,” or broadening of the concept. He noted the same fear that Roth expressed, the use of force being further “legitimized” by conformance to other evolving legal norms.<sup>135</sup>

The purpose of the article was to analyze Iraq as a humanitarian intervention within the criteria established by the International Commission on Intervention and State Sovereignty (ICISS) in the aftermath of the Kosovo conflict. According to Heinze, the ICISS was established in order to evaluate and define “legitimate” criteria for humanitarian intervention and recommend these to the U.N. Secretary General. These are:

right motives (primacy of humanitarian purpose), just cause (the level of violence must be ‘large-scale’), force must be a last resort, reasonable prospects for success, proportionality (force must not do more harm than good and must comply with humanitarian law); and right authority (force must be legitimated by some multilateral framework).<sup>136</sup>

Whether or not the intervention is publicly announced or viewed as a humanitarian intervention by the internal U.S. populace or externally by the international community bears on both the conduct of it and how it is presented to the American public. A case in contrast to the U.S. is the United Kingdom, where Prime Minister Blair outlined his criteria on what he believed were grounds or criteria for humanitarian intervention; Ignatieff also Blair’s criteria in “Virtual War.”<sup>137</sup>

As John Sloboda noted in a review of the “Blair Doctrine” since Kosovo, the Prime Minister, actually “justified wars over Kosovo, Afghanistan and Iraq by reference to humane

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<sup>134</sup> Eric A. Heinze, “Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice,” *Parameters* (Spring 2006): 20-34.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ignatieff, *Virtual War*, 72-73.

motives rather than humanitarian interests.”<sup>138</sup> He traced the concept of the “Blair Doctrine” as beginning in April 1999, when he announced to the Chicago Economic Club the concept in which a war could be “based not on any territorial ambitions but on halting or preventing humanitarian disasters such as genocide or ethnic cleansing.”<sup>139</sup> He states that it was soon after this, that the U.N. secretary-general Kofi Annan brought attention to the subject and requested nations to become involved in the defining of the concept. It was then that the ICISS, mentioned above, wrote the report which outlined the “responsibilities to protect;” in addition were the “responsibility to react, and the responsibility to rebuild.”<sup>140</sup> These are important because these responsibilities are linked to the concept that a state’s sovereignty may be subordinated to the international community obligation to protect a population “where a population is suffering serious harm (e.g. mass murder or starvation), and the state in question is unwilling or unable to avert it.”<sup>141</sup> Their established criteria were mentioned above, as “right intention, last resort, proportional means, and reasonable prospects.”<sup>142</sup>

Sloboda also noted that one reason why the international community has not taken this concept to a more legitimate level is the timing of 9/11, which occurred as the concept was starting to receive focus from the secretary-general, the United Nations, the ICISS, and from notable figures such as Prime Minister Blair. Further, he viewed the problem as a lack of attention in “the establishment media” and therefore the public mind. He examined the Kosovo intervention, “one that was explicitly justified on humanitarian grounds” in order to protect the Kosovo Albanian population from genocide and which achieved its mission.<sup>143</sup> He noted that this was not as great an achievement for the long run, there is still recurring ethnic hostility in 2004,

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<sup>138</sup> John Sloboda and Chris Abbott, Opendemocracy.net, On-line journal (22 April 2004), <[http://www.opendemocracy.net/globalization-institutions\\_government/article\\_1857.jsp](http://www.opendemocracy.net/globalization-institutions_government/article_1857.jsp)> (accessed March 2, 2007).

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

especially against the Serbs. He stated that prior to the war it received criticism because many opponents realized that the support of the Kosovo Liberation Army (KLA) could give “legitimacy and power to an organization that has continued to promote anti-Serb violence in the region.”<sup>144</sup> What is worse, however, is that the focus away from Kosovo after 9/11, he believes, took resources and support away from the effort which has hindered progress there for the long term success. The moral responsibility, then, he implies is on the Prime Minister and on the international community to continue assisting under this ICISS paradigm. He also stated (and is writing for the British audience) that the Iraq war was also was justified by Prime Minister Blair as a humanitarian one, for example:

Containment will not work ... The terrorists have no intention of being contained. Emphatically I am not saying that every situation leads to military action. But we surely have a right to prevent the threat materializing; and we surely have a responsibility to act when a nation’s people are subjected to a regime such as Saddam’s.<sup>145</sup>

Viewing this as a humanitarian intervention, Sloboda argued, would not be possible since it does not agree with the criteria set forth by the “Blair Doctrine” or the ones proposed by the ICISS. Further, he stated that “removal of a dictator” and “forestalling terrorist attacks” do not meet these criteria nor do they support “humanitarian principles.”<sup>146</sup>

### **Conclusion**

If there are moral obligations to intervene, these same moral obligations should be considered in planning and concluding any intervention. Such called-for conditions should be established that protect the basic human rights in question. It should be noted that what is moral to the policy maker may depend on the prevailing political situation and can vary considerably with time and with the execution of any intervention.

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<sup>143</sup> Sloboda and Abott, *Opendemocracy.net*.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

If there is a legal ability to intervene, this should be considered; however, Kosovo shows that strictly legal, positive criteria should be viewed in perspective. A consensus among the Security Council and the international community is not likely; so the U.S. can be expected to continue to lead efforts to more fully define the concept of humanitarian intervention.

Why are these considerations important? Will there likely be in the future more interventions that could be considered “humanitarian” as to justification? I agree that there needs to be a refinement in the criteria in the international community, such as what is already being done by the UN; however, what needs to be even more well-defined is the military and supporting missions that are implied by it and the clear communication of the necessities and commitment required to fulfill them. Applying this logic to the Iraq case, it would appear that the conditions in 2007 are similar to those in Kosovo that justified that intervention in the first place.

What are the ramifications for the risk-aversion, casualty avoidance, virtual war in future humanitarian interventions? Following Ignatieff’s reasoning, if applied to the future, would humanitarian intervention be an option only if there were little or no casualties? Since he wrote this in 2000, there have been no other humanitarian interventions. Is this because of the inherent, risk-averse nature in this type of operation and political constraints? Will the political constraints be too harsh to allow casualty tolerance?

The answer to the question on future legality and whether interventions will be viewed as humanitarian is unknown. At this time, the predominant scholars project this future based on the legal or international relations perspective. For example, Buchanan speaks to the legal future of humanitarian intervention as a concept or norm in the article, “Reforming the Law of Humanitarian Intervention.” He argues that the illegal nature of intervention, as was the case of Kosovo, increases and “creates a special burden of justification for the reformer.”<sup>147</sup> For him,

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<sup>147</sup> Allen Buchanan, “Reforming the Law of Humanitarian Intervention,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 172.

this justification implies a moral degree of obligation to correctly change the law through appropriate precedent. He stated, “a responsible agent confronted with the possibility of preventing a humanitarian disaster but aware that doing so is illegal under existing international law will ask not only whether there is a sound moral principle that allows or requires him to violate the law, but also whether he should act so as to try and bring about a change in the law.”<sup>148</sup> From a purely legal standpoint, he states, this could be achieved either by change in the UN legal system or by a “treaty-based regime.” In his view, this is another area where the morality influences the legal issues; he argued, that trying to make humanitarian intervention legal implies the necessity to “probe the morality of attempts to create new customary law.”<sup>149</sup>

If the Iraq war had been viewed as a humanitarian mission, and it may have been at least by one world leader, Prime Minister Blair, there are important considerations for planning. If humanitarian missions imply nation-building, then this is an important aspect that bears on any future termination of intervention. Such interventions have, like Kosovo, no strictly defined end point in time. Likewise, if Ignatieff’s “Virtual War” concept is applied to Iraq; and if war can become easy to approve, could it also become easier, or too easy, to end?

The current situation in Iraq, as of January 2007, has some parallels to the very conditions present that were cited in the justification for the Kosovo intervention. Ironically, these conditions have important implications for the future and especially for any future humanitarian crisis. For example, “ethnic cleansing” and massive, forced migration of certain ethnic groups occurred in the Kosovo situation. According to the January 2007, National Intelligence Estimate, this same type of event is occurring but is based on “ethno-sectarian” lines.<sup>150</sup> The report stated that “significant population displacement, both within Iraq and the

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<sup>148</sup> Buchanan, “Reforming the Law of Humanitarian Intervention,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, 173.

<sup>149</sup> Ibid.

<sup>150</sup> National Intelligence Council. National Security Estimate. “Prospects for Iraq’s Stability: A Challenging Road Ahead,” January 2007.

movement of Iraqis into neighboring countries, indicates the hardening of ethno-sectarian divisions . . . The UN estimates over a million Iraqis are now in Syria and Jordan.”<sup>151</sup>

Further, the Intelligence Estimate stated that this will intensify, should Coalition forces redeploy before the violence is stabilized; this would lead to further weakening of the current government and severely inhibit future peaceful relations within the state of Iraq and its surrounding states. It states:

if such a rapid withdrawal were to take place, we judge that the ISF would be unlikely to survive as a non-sectarian national institution, neighboring countries—invited by Iraqi factions or unilaterally—might intervene openly in the conflict; massive civilian casualties and forced population displacement would be probable; AQI would attempt to use parts of the country—particularly al-Anbar province—to plan increased attacks in and outside of Iraq; and spiraling violence and political disarray in Iraq, along with Kurdish moves to control Kirkuk and strengthen autonomy, could prompt Turkey to launch a military incursion.<sup>152</sup>

Furthermore, the report warned that should these conditions simply continue without abatement, there could still be a humanitarian crisis. According to the report, the present situation is one of “gradual decline;” a possible “rapid deterioration with grave humanitarian, political and security consequences” could also unfold, with several conditions kept unchecked.<sup>153</sup> These conditions, not based on any US redeployment alone, but on continued assassinations of religious and political leaders and lack of representation or approval by the Sunnis of the Iraqi government will exacerbate any of these possible humanitarian crises, with or without US redeployment whether it be now or in the near future.<sup>154</sup>

So the case could be made that creating conditions through intervention—which then leads to a humanitarian crisis, whether intended or not, involves a moral responsibility to continue that intervention on a humanitarian basis. And this should be true even if the intervention did not cause the humanitarian crisis per se, but set up a chain of events that led to it. Cook made a

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<sup>151</sup> Intelligence Council, National Security Estimate.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

similar argument in *The Moral Warrior*, when he asserted regarding Afghanistan, “it is impossible to exit when the central military mission is completed without undermining the moral justification of the entire intervention or even its long term political success.”<sup>155</sup>

### **Recommendations**

Military planners and policy makers should be aware that the moral and legal issues extend well past the initial intervention, as Kosovo shows. O’Neill’s account of the aftermath of the Kosovo bombing and its consequences shed light on the problems with Iraq stability. For example, he stated that the “revenge attacks” were initiated as soon as the bombing campaign ended.<sup>156</sup> He gives a description of the events that NATO was left to contend with immediately after they entered Kosovo: it was one of “mayhem and void” and a “completely lawless state.”<sup>157</sup> Some of the details he viewed were horrendous with constant revenge killings, mass population fears of chaos and absolute lack of any law and order or functioning legal system. He indicates that had martial law been instituted, it might have forestalled the human rights abuses that continued by the KLA and the ousted Serbs; this ultimately resulted in the manifestation of organized crime and increased minority abuses. This he believes, is a case where as a matter of priority, the legal system must be established; otherwise, the best intentions for intervening will never materialize.<sup>158</sup> If this is true, a military planner or policy maker should be aware that legal and moral issues will continue past the initial intervention; if not carefully considered and prepared for, there will be legal and moral problems that result; ones that could taint the whole intervention itself.

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<sup>155</sup> Martin L. Cook, *The Moral Warrior* (Albany, NY: State University of New York Press, 2004), 106.

<sup>156</sup> O’Neill, *Kosovo: An Unfinished Peace*, 75.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

As William O'Brien observed during the post-Vietnam period, the time was right then to re-examine the two main factors of U.S. “guidelines” that justify intervention, and those were legal and moral.<sup>159</sup> Ironically, according to his theory, it will be for these two “guidelines” that it will be opposed!<sup>160</sup> For example, as US interests continue to expand across the globe, as O'Brien points out, the American power can be expected to be challenged as well.

It would be logical that resistance to intervention would be increased proportionally to the American power. This is a realist viewpoint; that power tends to be balanced. With increasing globalization and the power of the mass media and its ubiquity, this can be expected to aggravate the effects of resistance to American intervention into the affairs of other states. According to O'Brien, the smaller states that have tended to be given a louder “voice” because of the United Nations and other systems, will increase the stronger nations’ need to justify intervention even further.<sup>161</sup>

Carrying this view a step further, this trend should be expected to increase with globalization and pressures from any world global court system as well. O'Brien explains the irony in this process has served to restrict intervention. For example, it was the large powers that created the very international institutions who have both raised and cemented the non-intervention value; apparently in order to protect their own interests from competitors; however, it was a “consequence” of this that smaller states use it to protect themselves from any intervention that serves to restrict large states and provide need for justification for intervention. So the need for justification from both moral and legal angles should continue to be needed and should be considered when decisions are made to intervene. These justifications should also be considered in how to plan what follows the intervention. Further, a humanitarian intervention, as explained

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<sup>159</sup> O'Brien, *U.S. Military Intervention, Law and Morality*, 7.

<sup>160</sup> Ibid., 10.

<sup>161</sup> Ibid., 10-11.

in the previous sections, has complex legal and moral issues where a lack of consensus increases the complexity.

With the pervasive influence of the US as a global superpower, it would be reasonable to expect that globalization and competition for resources will make this need for intervention more pervasive. However, this can be expected to be resisted. As O'Brien asserted, states tend to resort to a non-intervention stance in order to cloak human rights abuses.<sup>162</sup> If the need for states to hide atrocities and genocide from outside agencies increases, so might the balancing effect of less powerful nations to collude with their allies to prevent any intervention or to block justification of these, particularly using international law and norms.

As stated previously in this paper, the intervention into Kosovo was not legal, at least in the traditional sense; however, as O'Brien states, war is obviously not "outlawed," simply because of the prohibitions that have been placed on aggression by that very international legal system.<sup>163</sup> This is because the international system is more than just a legal system per se; it is a system of many instruments of national power; the legal structures being a dynamic part of it, not taking dominance or precedence over any one other part. O'Brien points out that intervention will be seen as unjust or just, depending on nations' view of justice itself and who or what entity should the law protect; for example, "in the international as in many domestic orders there are a variety of views as to who should prevail and whether justice is on the side of the 'police'"<sup>164</sup>. Accordingly, the ante will be raised even further for legal and moral justification; again, these are situations that call for careful considerations by military planners and policy makers.

Other trends will play into this dynamic, for example, the power of the United Nations, power of nations with oil resources, and international opinion toward the evolution of world justice, where the idea of justice could polarize to an extreme degree. This is where world court

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<sup>162</sup> O'Brien, *U.S. Military Intervention, Law and Morality*, 12.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

bodies and structures are lacking in power and influence and should be given the opportunity to be heard. These structures and entities can serve as a moderating influence when any future intervention is considered or planned. For these reasons, US military planners will need to be aware of the international legal bodies and their growing influence in the international community. The legal structures of the UN, such as the International Court of Justice should not be overlooked in their influence and potential to legitimize and set the agenda for US interests.

US planners and policy makers should consider these legal and moral issues and their positive potential in a proactive sort of way in order to properly inform world perception. This will permit future humanitarian interventions and the benefits that may be derived in the crucial, initial early stages and will avoid tainting them in the future.

## **APPENDIX**

The following are referenced provisions of the Charter of the United Nations:

Charter of the United Nations (signed June 26, 1945)

Art. 2.4 All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United States.

Art.51. Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Art. 53

(1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on the request of the Governments concerned, be charged with the responsibility of preventing further aggression by such a state.

(2) The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

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